Supreme Court, U. S.
FILED
JUL 10 1979
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of The United States

October Term, 1979

No. 79-454

GERALD A. LEWIS, Comptroller of the State of Florida and Commissioner of Banking of the State of Florida,
*Appellant,*

-vs-

BT INVESTMENT MANAGERS, INC. and BANKERS TRUST NEW YORK CORPORATION,
*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

## JURISDICTIONAL STATEMENT

EUGENE J. CELLA
General Counsel
Office of the Comptroller
The Capitol
Tallahassee, Florida 32301
(904) 488-9355

FRANKLYN J. WOLLETT
Assistant General Counsel
Office of the Comptroller
The Capitol
Tallahassee, Florida 32301
(904) 488-9896
Counsel for Appellant

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Questions Presented | 3 |
| Constitutional Provision, Statutes and Rules Involved | 4 |
| Statement of Case | 5 |
| Federal Questions are Substantial | 8 |
| Conclusion | 20 |
| Appendix | |
| A. Order of District Court, Accompanying Opinion filed December 15, 1978 | A1 |
| B. Opinion of District Court, Northern District of Florida, Tallahassee Division, filed December 15, 1978 | B1 |
| C. Statutes and Rules Involved | C1 |
| 1. Florida Statutes § 659.141(1) (1977) | C1 |
| 2. Florida Statutes § 660.10(1977) | C1 |
| 3. 12 U.S.C. § 1842(d) | C4 |
| 4. 12 U.S.C. § 1843(c)(8) | C5 |
| 5. 12 U.S.C. § 1846 | C7 |
| 6. 12 C.F.R. § 225.4(a)(4) and (5) | C7 |
| D. Order of District Court Accompanying Opinion—Order, filed March 22, 1979 | D1 |
| E. Opinion-Order of District Court on Reclarification and Reconsideration, filed March 22, 1979 | E1 |
| F. Notice of Appeal to Supreme Court of the United States | F1 |
| Proof of Service | 21 |

## TABLE OF AUTHORITIES


*CASES* *PAGE*

*Alabama Association of Insurance Agents v. Board of Governors,*
533 F.2d 224 (5th Cir. 1976) ..... 9,11

*BT Investment Managers, Inc. and Bankers Trust New Corporation v. Lewis,*
559 F.2d 950 (5th Cir. 1977) ..... 14

*BT Investment Managers, Inc. and Bankers Trust New York Corporation v. Lewis,*
461 F.Supp. 1187 (N.D. Fla. 1978) ..... 2,10,18

*Exxon Corporation v. Governor of Maryland,*
_____U.S._____, 98 S.Ct. 2207,
57 L.Ed.2d 91 (1978) ..... 19

*Farmers' Loan and Trust Company v. Smith,*
74 Comm. 626, 51 A. 609 (1902) ..... 13

*Florida Lime and Avocado Growers v. Jacobsen,*
262 U.S. 73, 80 S.Ct. 568,
4 L.Ed.2d 568 (1960) ..... 3,8

*Gould v. Board of Home Missions,*
167 N.W. 777 (Neb. 1918) ..... 13

*Gunn v. University Committee,*
399 U.S. 383, 90 S.Ct. 2013,
26 L.Ed.2d 684 (1970) ..... 8

*Hughes v. Oklahoma,*
_____U.S._____, 99 S.Ct. 1727,
_____L.Ed.2d_____ (1979) ..... 17





*Investment Company Institute v. Board of Governors,*
_____F.2d_____ Case No. 77-1862
(D.C. Cir. March 30, 1979) ..... 8,11,12

*National Courier Association v. Board of Governors,*
170 U.S. App. D.C. 301, 516 F.2d 1929 (1975) .. 10,11

*Paul v. Virginia,*
75 U.S. (8 Wall.), 19 L.Ed. 357 (1869) ..... 13

*Philadelphia v. New Jersey,*
_____U.S._____, 98 S.Ct. 2581,
57 L.Ed.2d 475 (1978) ..... 4,17,18

*Railway Express Agency v. Commonwealth of Virginia,*
282 U.S. 400, 51 S.Ct. 201 (1931) ..... 15,16

*Re Avery's Estate,*
45 Misc. 529, 92 N.Y.S. 974 (1904) ..... 13

*Roe v. Wade,*
410 U.S. 113, 93 S.Ct. 705,
35 L.Ed.2d 147 (1973) ..... 3,8

*White v. Register,*
412 U.S. 755, 93 S.Ct. 2332
37 L.Ed.2d 314 (1973) ..... 3,8

*Whitney National Bank v. Bank of New Orleans,*
379 U.S. 411, 85 S.Ct. 55 (1965) ..... 6

| *STATUTES* | *PAGE* |
|---|---|
| Florida Statutes § 659.05(1977) | |
| Florida Statutes § 659.141(1)(1977) | 2,4,6,7,8,9,14, 17,18,19,20 |
| Florida Statutes § 660.10(1977) | 2,4,6,7,8,12,14 16,17,18 |
| 12 U.S.C. § 1253 | |
| 12 U.S.C. § 1841 | 5 |
| 12 U.S.C. § 1842(d) | 3,4,9, |
| 12 U.S.C. § 1843(c)(8) | 5,9,10 |
| 12 U.S.C. § 1846 | 3,5,9 |
| 28 U.S.C. § 2281 | 2,3 |
| Pub. L. 94-381, August 12, 1976, 90 Stat. 1119 | 3 |
| *OTHER AUTHORITIES* | |
| U.S. Const. Art. 1, § 8, C1.3 | 2,4 |
| 12 C.F.R. § 225.4(a)(4) | 5,6 |
| 12 C.F.R. § 225.4(a)(5) | 5 |
| 1 *Scott on Trusts* § 96.6 (2nd Ed. 1956) | 13 |
| Anno., *Eligibility of Foreign Corporation to Appointment as Executor, Administrator or Testamentary,* 26 A.L.R. 3d 1019 (1969) | 13 |
| Rule 13(2) of the Rules of the Supreme Court of the United States | 1 |
| Rule 15 of the Rules of the Supreme Court of the United States | 1 |




IN THE

# Supreme Court of The United States

October Term, 1979

No. _____

GERALD A. LEWIS, Comptroller of the State of Florida and Commissioner of Banking of the State of Florida,
*Appellant,*

-vs-

BT INVESTMENT MANAGERS, INC. and BANKERS TRUST NEW YORK CORPORATION,
*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

## JURISDICTIONAL STATEMENT

Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, Appellant, GERALD A. LEWIS, files this statement on the basis upon which

it is contended that the Supreme Court of the United States has jurisdiction to review the Order entered by the United States District Court, Northern District of Florida, Tallahassee Division in this case and should exercise such jurisdiction herein because substantial questions are presented.

Appellant appeals from the Order, entered in this action on December 15, 1978, and as altered and amended on March 22, 1979, declaring Florida Statutes § 660.10(1977) and a portion of the first sentence of Florida Statutes § 659.141(1)(1977), unconstitutional as violative of Article I § 8 of the United States Constitution, and enjoining Appellant from enforcing against Appellees the aforesaid portion of the first sentence of Florida Statutes § 659.141 (1)(1977).

## *OPINIONS BELOW*

The Opinion and Order of the United States District Court for the Northern District of Florida, which appears in the appendix hereto, App. B-1 and A-1, *infra*, is reported at 461 F.Supp. 1187 (N.D.Fla.1978). The Order of March 22, 1979, altering and amending the Court's Order of December 15, 1978 is not reported. It is reprinted in the appendix hereto, App. D-1, *infra*.

## *JURISDICTION*

The appeal herein is from a Final Order made and entered in the United States District Court for the Northern District of Florida by a specially constituted three-judge panel convened under 28 U.S.C. § 2281. This action was filed on October 24, 1973, and thus the propriety of impanelling a three-judge court was unaffected by the repeal



of 28 U.S.C. § 2281 in 1976. Pub.L. 94-381, August 12, 1976, 90 Stat. 1119. The Order enjoins the enforcement of a portion of a certain State banking statute, and declares such portion of the statute, along with an additional State statute, unconstitutional as violative of Article I, § 8 of the United States Constitution.

The Final Order was made and entered on December 15, 1978. See App. A-1 and B-1, *infra*. A motion for clarification, reconsideration and to alter and amend judgment was duly filed December 26, 1978. The Order was altered and amended, in part, on March 22, 1979. See App. D-1 and E-1, *infra*. Notice of Appeal on behalf of the Appellant was filed on May 11, 1979 in the United States District Court for the Northern District of Florida. See App. F-1, *infra*.

The Supreme Court of the United States has jurisdiction to review the Final Order by direct appeal pursuant to 28 U.S.C. § 1253. *White v. Regester*, 412 U.S. 755, 761, 93 S.Ct. 2332, 2337, 37 L.Ed.2d 314 (1973); *Roe v. Wade*, 410 U.S. 113, 123, 93 S.Ct. 705, 711, 35 L.Ed.2d 147 (1973); *Florida Lime and Avocado Growers v. Jacobsen*, 362 U.S. 73, 80, 80 S.Ct. 568, 573, 4 L.Ed.2d 568 (1960).

## *QUESTIONS PRESENTED*

1. Whether the express grant of authority to the several states to prohibit or exclude an out-of-state bank holding company from owning, acquiring or controlling a *bank* in a particular state, 12 U.S.C. § 1842(d), together with 12 U.S.C. § 1846, Reservation of Rights to the States, of the Banking Holding Company Act of 1956, as amended in 1970, also includes an implied grant of authority for a

state to prohibit or exclude a bank holding company's entry into certain activities which are deemed "so closely related to banking to be a proper incident thereto."

2. Whether a state, by statute, may require all entities, foreign or domestic, *seeking to do trust business in that state,* to incorporate in that state and obtain a specific charter and certificate of authority to do trust business without violating Article I § 8 Cl. 3 of the United States Constitution.

3. Whether the lower court incorrectly applied the Commerce Clause principles laid down by this Court in *Philadelphia v. New Jersey,* _____U.S._____, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978), in holding a portion of Florida Statutes § 649.141(1)(1977), and Florida Statutes § 660.10(1977) unconstutitional.

## *THE CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED*

1. *Article I § 8 Cl. 3 United States Constitution*
   Congress shall have power . . . to "regulate commerce . . . among the several states, . . ."

2. Florida Statutes § 659.141(1)(1977)
   (The full text of the statute is set forth in appendix C—1 hereto.)

3. Florida Statutes § 660.10(1977)
   (The full text of the statute is set forth in appendix C—1 hereto.)

4. 12 U.S.C. § 1842(d)



   (The full text of the statute is set forth in appendix C—4 hereto.)

5. 12 U.S.C. § 1843(c)(8)
   (The full text of the statute is set forth in appendix C—5 hereto.)

6. 12 U.S.C. § 1846
   (The full text of the statute is set forth in appendix C—7 hereto.)

7. 12 C.F.R. § 225.4(a)(4) and (5)
   (The full text of the regulations is set forth in appendix C—7 hereto.)

## *STATEMENT OF THE CASE*

Appellee, Bankers Trust New York Corporation (BTNY) is a bank holding company as contemplated by 12 U.S.C. § 1841, et seq., organized under the laws of the State of New York. BTNY created a wholly owned subsidiary, a Delaware corporation, Appellee, BT Investment Managers, Inc. (BTIM). BTIM was formed for the purpose of engaging in the business of providing investment advisory services, but because it is owned by a bank holding company, it could not engage in such business until such time as it acquired the approval of the Federal Reserve Board pursuant to 12 U.S.C. § 1842. "Acting as investment or financial adviser" is an activity the Board has determined to be a "closely related activity to banking to be deemed a proper incident thereto." 12 C.F.R. § 225.4(a)(5), App. C—5. BTNY and BTIM applied for such approval in October 1972. Objections to the application were filed by Fred O. Dickinson, Jr., as Florida Comptroller,

Appellant's predecessor in office, and by the Florida Bankers Association.

At the time the application was filed, Florida Statutes § 659.141(1)(1971) prohibited Appellee, BTNY, an out-of-state holding company, from owning or controlling an investment advisory business in Florida where or from which it furnishes investment advisory services to trust companies or banks in Florida. The Florida legislature, amended § 659.141(1), effective December 21, 1972, and extended the prohibition to businesses furnishing of investment advisory services to any person rather than, theretofore, only to Florida trust companies and banks.

In April 1973, the Board of Governors of the Federal Reserve System denied the Appellee's application, in accordance with *Whitney National Bank v. Bank of New Orleans,* 379 U.S. 411, 85 S.Ct. 55 (1965), principally because of the prohibition of Florida Statutes § 659.141(1), as amended. No appeal of the Board's Order of Denial was taken.

In addition to the investment adviser office, Appellee, BTNY is also seeking to establish, through a subsidiary, a de novo Florida trust company. Florida Statutes §§ 659.141 (1) and 660.10 together prohibit such establishment. "Trust business" is an activity the Board has determined to be a "closely related activity to banking to be deemed a proper incident thereto." 12 C.F.R. § 225.4(a)(4), App. C—5.

In October 1973, Appellees filed suit against the Comptroller of the State of Florida, Appellant's predecessor in office, seeking a declaration that Florida Statutes



§§ 659.141(1) and 660.10 contravene the United States Constitution and for an injuction restraining their enforcement.

The cause was originally dismissed by the three-judge panel on "abstention" grounds. The dismissal was appealed and eventually reversed and remanded to the district court. Upon stipulated facts, final hearing was held on September 1, 1978. The district court by Final Order, as amended, declared Florida Statutes § 660.10, and the first sentence of Florida Statutes § 659.141(1), *excluding* that portion which prohibits a bank, trust company, or holding company, the operations of which are principally conducted outside Florida, from acquiring, owning or controlling a *bank* having a place of business, unconstitutional as violative of Article I § 8 of the United States Constitution. Appellant was permanently enjoined from enforcing against Appellees the aforesaid portion of the first sentence of Florida Statutes § 659.141(1)(1977). The district court did not grant injunctive relief as to Florida Statutes § 660.10(1977), stating,

> Since plaintiffs have yet to attempt to establish a trust company subsidiary in Florida, injunctive relief barring enforcement of Florida Statutes § 660.10 would be premature, and therefore inappropriate, at this time. (See App. B—22)

A protective Notice of Appeal to the United States Court of Appeal for the Fifth Circuit was filed in the district court on April 20, 1979. On May 14, 1979, further proceedings in appeal to the Fifth Circuit were stayed, pending the resolution of any jurisdictional problem in this Court. As to Florida Statutes § 660.10 (1977), the

district court entered a declaratory judgment unaccompanied by any injunctive relief. Under these circumstances *alone*, Appellants could not appeal directly to this Court. *Gunn v. University Committee*, 399 U.S. 383, 90 S.Ct. 2013, 26 L.Ed.2d 684(1970). However, because the district court also entered a declaratory judgment *and* specifically granted injunctive relief as to Florida Statutes § 659.141(1)(1977), this Court has direct appeal jurisdiction pursuant to 28 U.S.C. § 1253. Consequently, this Court has jurisdiction of the *entire* appeal as to Florida Statutes §§ 659.141(1) *and* 660.10(1977), of both the injunctive and declaratory aspects of the case. *White v. Regester, supra*, at 761; *Roe v. Wade, supra*, at 123; *Florida Lime and Avocado Growers v. Jacobsen, supra*, at 80. The issues and arguments as to both aspects are substantially identical, and it is in the interest of judicial economy and the avoidance of piecemeal litigation for this Court to have appeal jurisdiction of the *entire* appeal.

## *FEDERAL QUESTIONS ARE SUBSTANTIAL*

### 1. Florida Statutes § 659.141 (1)(1977)

The case presents a variation on a recurring theme in modern banking law: the tension between federal regulatory statutes designed in part to limit bank activities, and attempts by banks, and bank holding companies—often sanctioned by federal banking authorties—to compete in broader lines of business. See *Investment Company Institute v. Board of Governors of the Federal Reserve Board*. ____F.2d.____ Case No. 77-1862 (D.C.Cir. March 30, 1979). The added variation concerns the constitutional validity of a Florida banking statute which prohibits or excludes certain banking holding companies' entry into these



"broader lines" of businesses, which the Federal Reserve Board has deemed "so closely related to banking as to be a proper incident thereto." Of necessity, the district court below based its decision upon its interpretation of the congressional intent and purpose behind the enactment of the Bank Holding Company Act of 1956, and the 1970 Amendments thereto.

In holding a portion of § 659.141(1), unconstitutional, the district court ruled for the first time upon the scope of 12 U.S.C. § 1842(d), and 12 U.S.C. § 1846 in light of the 1970 Amendments to 12 U.S.C. § 1843(c)(8), which permit bank holding companies to engage, for the first time, in certain activities "closely related to banking." The precise issue of whether the express grant of authority by Congress to the several states to prohibit or exclude an out-of-state bank holding company from owning, acquiring or controlling a *bank* includes an implied authority for a state to prohibit or exclude entry to certain activities deemed "so closely related to banking to be a proper incident there," has never before been litigated in any known decision.

In the court below, appellant argues that 12 U.S.C. §§ 1842(d) and 1846 necessarily include such authority in light of the congressional purpose of the Bank Holding Company Act of 1956, and the 1970 Amendments thereto.

The original congressional purpose behind enactment of the 1956 Act was to limit the concentration of economic power in the hands of bank holding companies. See *Alabama Association of Insurance Agents*, 533 F.2d 224, 231 (5th Cir. 1976). Section 4(a) of the Act exempted, however, companies whose activities are "of a financial, fiduciary, or insurance nature," and which the Board of Governors of the Federal Reserve has determined to be so

"closely related to the business of banking or of managing or controlling banks as to be a proper incident thereto." Section 4(c)(8) of the Bank Holding Act. 12 U.S.C. § 1843(c)(8).

In 1970, Congress amended the Act, to include one-bank holding companies into the Act's regulatory scheme. Section 4(c)(8) was amended to delete the statutory language regarding "of a financial, fiduciary, or insurance nature." The court below interpreted the 1970 Amendment to Section 4(c)(8) as indicating congressional intent to "expand the range of business activities in which bank holding companies could engage, giving them greater flexibility." *BT, supra,* at 1200, citing *National Courier Association v. Board of Governors,* 170 U.S.App.D.C. 301, 308-09. 516 F.2d 1229, 1236-37(1975).

Appellant argues that the 1970 Amendments did not change the original congressional purpose behind enactment of the 1956 Act, which was to limit the concentration of economic power in the hands of bank holding companies. The ability of the states to exclude or prohibit acquisition of banks within a particular state must necessarily carry with it the ability to prohibit the acqusition of companies involved in closely related activities. Otherwise, a "loophole" would be created allowing bank holding companies to expand their operations into non-consenting states despite the congressional mandate giving the states power to exclude them. *BT, supra,* at 1199. However, the lower court specifically held that the purpose of the 1970 Amendements, as viewed by the court, runs counter to appellant's argument, stating, at 1200, App. B—21,



> . . . the Florida statutes at issue here, by drastically curtailing the rights of foreign bank holding companies and their subsidairies to engage in banking-related businesses in this Florida, are at least inconsistent with, if not contrary to, the desires of Congress.

Courts have disagreed as to implications of the 1970 Amendments, and as to congressional intent and purpose behind them. *Compare National Courier Association v. Board of Governors, supra,* at 1236 with *Alabama Association of Insurance Agents v. Board of Governors,* 533 F.2d 224, 239 (5th Cir. 1976), *modified on other grounds,* 558 F.2d 729 (5th Cir. 1977), *cert. denied,* 435 U.S. 904 (1978).

The only known decision interpreting the intent and scope of the 1970 Amendements as they relate to the permissibility of activities in the *securities* area by bank holding companies and their non-bank subsidiaries is the recent case of *Investment Company Institute v. Board of Governors, supra.* This decision was not available at the time this Court entered its judgment and its Order altering the judgment.

In *Investment Company Institute,* the court, in vacating a regulation and interpretative ruling of the Federal Reserve Board, held that the Board is not empowered by Section 4(c)(8) of the Bank Holding Company Act to authorize bank holding companies and their non-bank subsidiaries to act as investment advisors to closed-end investment companies, since that function is not "so closely related to banking" as to warrant exemption from the Act's general prohibition against holding company involvement in other than banking activities.

Of significance is the Circuit Court of Appeals recognition of the underlying policies of the 1970 Amendments. As viewed by the court, the main thrust of the legislation was to prevent one-bank holding companies—which had been exempt from the 1956 Act—from entering businesses not related to banking. The burgeoning of one-bank holding companies at the time was thought to pose two separate dangers. First, there was concern that bank holding companies would improperly further the interests of their non-bank subsidiaries by abusing the power of bank subsidiaries. Second, and more importantly, Congress was concerned that the economy was becoming structured along the lines of the Japanese "zaibatsu" system, in which economic power is concentrated in a few gigantic power centers. See *Investment Company Institute, supra,* p. 39 of the slip opinion, and footnote 67.

The court below seems to reject appellant's contention that the 1970 Amendments did not change the original congressional purpose behind enactment of the Bank Holding Company Act of 1956, which was to limit the concentration of economic power in the hands of bank holding companies. See *BT, supra,* at 1200, App. B—20.

Because the 1970 Amendments did not affect the original intent of the 1956 Act to prevent the concentration of financial power by bank holding companies, it is not inconsistent to infer that the State's ability to prohibit the acquisition of banks must necessarily carry with it the ability to prohibit the acquisition of companies involved in closely related activities. This issue is crucial to the banking industry, the national economy, and the public interest. Congress, at this moment, is engaged in an important debate concerning the function and relation of banking to the economy.



The question presented to this Court is very substantial, affecting, as it does, the relation between federal and state regulation of banking holding company expansion into banking related activities.

2. Florida Statutes § 660.10(1977)

In holding § 660.10, Florida Statutes, unconsitutional, the lower court struck down a statute which had been the governing law of Florida for over 50 years, and which is similar to statutes enacted in other jurisdictions for similarly lengthy periods. Numerous statutes in various jurisdictions either exclude foreign banks generally from conducting business or deny foreign corporations the right to act as fiduciaries. See 1 *Scott on Trusts* § 96.6 (2d Ed. 1956); Anno., *Eligibility of Foreign Corporation to Appointment as Executor, Administrator or Testamentary,* 26 A.L.R. 3d 1019 (1969). For examples of decisions applying such exclusionary statutes, see *Farmers' Loan and Trust Co. v. Smith,* 74 Comm. 625, 51 A. 609 (1902); *Re Avery's Estate,* 45 Misc. 529, 92 N.Y.S. 974 (1904); *Gould v. Board of Home Missions,* 167 N.W. 777 (Neb. 1918). In question is the right of a state to bar a foreign corporation from doing business within its boundaries as recognized in *Paul v. Virginia,* 75 U.S. (8 Wall.) 168,19, L. Ed. 357 (1869).

Florida Statutes § 660.10 (1977) not only prohibits out-of-state corporations from performing certain fiduciary activities, it also prohibits *all* corporations from engaging in these activities, domestic and foreign, except Florida corporate trust companies *with trust powers* and national

banks located in Florida with specific trust powers. Apart from the prohibition contained in § 659.141(1), Florida Statutes (1977), § 660.10 *does not* prohibit Plaintiffs from competing, through a Florida subsidiary, with Florida trust companies. Section 660.10 merely requires an entity wishing to engage in certain trust activities to incorporate in Florida, and obtain trust powers. Trust powers can only be obtained through licensing and chartering provisions of Florida Statutes § 659.05(1977), after the Department of Banking and Finance finds that the proposed trust company has complied in good faith with all the requirements of law. Therefore, § 660.10, apart from § 659.141(1), does not "cordon off Florida trust companies from competition by out-of-state concerns." It merely requires an out-of-state entity to establish a Florida subsidiary corporation if it wants to engage in trust activities in Florida.

Plaintiffs attack on § 660.10 can only be viewed in *conjunction* with § 659.141(1). As noted by the Fifth Circuit Court of Appeals when in *BT Investment Managers, Inc. and Bankers Trust New York Corporation v. Gerald A. Lewis*, 559 F.2d 950, 955 (5th Cir. 1977) it considered the applicability of the "abstention doctrine" in the case at bar,

> . . . — it must be remembered that appellants [plaintiffs] focus their attack upon a single statute. . .[28]

28. Although Fla. Stat. §§ 659.141(1) and 660.10 are both attacked, § 660.10 merely enumerates various trust powers and duties and is attacked only insofar as it compliments § 659.141(1).



Thus, the lower court may have gone too far in declaring § 660.10 unconstitutional.

There is no constitutional impediment to a state refusing to grant a foreign corporation a permit to transact local business without taking out a charter from the jurisdiction within which that business is to be done. In *Railway Express Agency v. Commonwealth of Virginia*, 282 U.S. 400, 444, 51 S.Ct. 201, 202 (1931), the Supreme Court affirmed an order of the Virginia Corporation Commission that denied to the appellant a certificate of authority to do an intrastate express business in Virginia. The appellant was a Delaware corporation. The Virginia Constitution prohibited foreign corporations from doing an intrastate express business, limiting such activities to Virginia corporations. Appellant attacked the prohibition as being a direct burden upon interstate commerce, and in violation of the Fourteenth Amendment in that the requirement of the Virginia Constitution "deprives the appellant of its right to sue in the federal courts and to remove suits to them on the ground of diversity of Citzenship."

The Supreme Court, in rejecting the commerce clause attack, stated:

> Virginia is not attempting to go beyond its power by indirection or to take anything from anybody. It simply is refusing to grant a foreign corporation a permit to transact local business without taking out a charter from the jurisdiction within which that business must be done. There is no substantial evidence that the refusal would impose a burden on interstate commerce, and it is presumed to be constitutional. . . We may add that . . . the difficulties created by the

Constitution of Virginia probably will not prove hard to overcome when it is found that they must be met. (282 U.S. at 444.)

The Supreme Court also rejected the Fourteenth Amendment argument, stating:

The appellant is not deprived of any rights. It can do all that it ever could. If it sees fit to acquire a new personality under the laws of Virginia it cannot complain that the new person has not the same rights as itself. Of course there can be no suggestion here that the clause in the State Constitution was adopted for a sinister end. And unless it was, the inability of the new State corporation to do all that the appellant could have done is only the legitimate incident of a legitimate act. (282 U.S. at 444.)

Section 660.10, by analogy, does not "take anything from anybody," nor is the State of Florida "attempting to go beyond its power by indirection." Section 660.10 merely refuses to grant *any* corporation, foreign or domestic, authority to transact local trust business without "taking out a charter from the jurisdiction within which that business must be done." It is not so much a prohibition or exclusion as a resonable and permissible method of effective regulation in an important area of fiduciary activities.

An important issue is presented to this Court, the determination of which substantially affects many similar state statutes in other jurisdictions. The question involves an area of traditional state concern, regulation of fiduciary activities.



3. Florida Statutes § 649,141(1)

In light of Philadelphia v. New Jersey, ____U.S. ____, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978)

The lower court decision is heavily premised on the court's interpretation and application of *Philadelphia v. New Jersey, supra.* As noted by the lower court, *BT, supra,* at 1196,

Accordingly, the chief inquiry in the instant case is whether §§ 659.141(1) and 660.10 are 'basically . . . protectionist measure[s], or whether [they] can fairly be viewed as law[s] directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.' *Philadelphia v. New Jersey,* ____U.S. at ____, 98 S.Ct. at 2536, 57 L.Ed.2d at 482.

In determining a Commerce Clause issue, under the general rule, a court must inquire, (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce. The burden to show discrimination rests on the party challenging the validity of the statute, but when discrimination against commerce is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscrimination alternatives adequate to preserve the local interests at stake. *Hughes v. Oklahoma,* ____U.S.____, 99 S.Ct. 1727, ____L.Ed.2d____, (1979).

The lower court, specifically found, *BT, supra,* at 1196,

> The record here, though sparse, is sufficient to indicate conclusively the discriminating nature of the statutes under attack. By its terms, Section 659.141(1) erects an insuperable barrier to the entry of foreign based bank holding companies, through their subsidiaries, into the Florida investment advisory market. Section 660.10 similarly cordons off Florida trust companies from competition by out-of-state concerns. Thus, according to *Philadelphia* v. *New Jersey, Supra,* this parochial legislation must be deemed per se unconstitutional.

The facts of *Philadelphia, supra,* did indeed establish discrimination against articles of commerce coming from outside the State. The New Jersey statute attacked prohibited the importation of most solid or liquid waste which *originated* or was collected outside the territorial limits of the State. There was no reason, apart from their origin to treat them differently.

However, in the case at bar, § 659.141(1) does not discriminate against a corporation on the basis of its origin or ownership. The statute says that a bank holding company or trust company "the operation of which are principally conducted outside this state" may not control business performing banking and closely related activities in the state. A foreign corporation whose operations were principally conducted in this state could control a bank or investment advisory business. Conversely, a domestically incorporated business which had its principal operations out of the state would feel the same effect of the prohibition. The burden thus falls equally on foreign and domestic businesses alike.



As stated by this Court in *Exxon Corporation* v. *Governor of Maryland,* ____U.S.____, 98 S.Ct. 2207, 2215, 57 L.Ed.2d 91 (1978), the Commerce Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations. In *Exxon, supra,* this Court upheld a Maryland statute which prohibited any corporation that produced or refined petroleum products from operating a retail service station within the state. The oil companies argued that the effect of the act was to create a protected market for Maryland's independent dealers, since there were no local refiners or producers. This argument was rejected. Pointing to the relevant market, retail service stations, this Court noted that the act did not bar interstate dealers who were not refiners or producers.

> In fact, the act creates no barriers whatsoever against interstate independent dealers, it does not prohibit the flow of interstate goods, place added costs on them, or distinguish between in-state and out-of-state companies in the retail market . . . the fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against inter-state commerce. Id at 100.

Section 659.141(1) does not prohibit the flow of interstate services. There is certainly nothing on the record to suggest there are added costs on investment advisory services caused by this regulation. As far as the consumer is concerned, there is no distinction in the market place. Indeed, non-banking corporations whose principal place of business are out of the state may supply investment advisory services. The Commerce Clause protects the market, *not* the specific marketer.

The policy of limiting the entry into the state of out-of-state companies is consistent with congressional legislation. To declare § 659.141(1) unconstitutional would be to substantially undermine the dual system of banking, and in effect, deprive the state of the right that Congress has given them to regulate participation in the financial community within their borders.

*CONCLUSION*

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

Eugene J. Cella
General Counsel
Office of the Comptroller
The Capitol
Tallahassee, Florida 32301
(904) 488-9355

Franklyn J. Wollett
Assistant General Counsel
Office of the Comptroller
The Capitol
Tallahassee, Florida 32301
(904) 488-9896

DATE: July 9th, 1979

# APPENDIX

# APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

BT INVESTMENT MANAGERS, INC. and
BANKERS TRUST NEW YORK CORPORATION,

Plaintiffs,

vs. TCA 73-184

GERALD A. LEWIS, Comptroller of the State of Florida and Commissioner of Banking of the State of Florida, *ORDER*

Defendant.

---

In accordance with the opinion of the court entered this date, it is hereby declared that Florida Statutes § 660.10 (1977) and the first sentence of Florida Statutes § 659.141 (1) (1977) are unconstitutional as violative of Article I, § 8 of the United States Constitution. Defendant and his officers, agents, and employees are hereby permanently enjoined from enforcing against plaintiffs the provisions of the first sentence of Florida Statutes § 659.141(1) (1977). The clerk of the court is directed to enter judgment accordingly.

DONE AND ORDERED this 15th day of December, 1978.

/s/ Paul H. Roney
PAUL H. RONEY
CIRCUIT JUDGE

/s/ Winston E. Arnow
WINSTON E. ARNOW
CHIEF JUDGE

/s/ William Stafford
WILLIAM STAFFORD
DISTRICT JUDGE

OFFICE OF CLERK
U.S. DISTRICT CT.
NORTH DIST., FLA.
TALLAHASSEE, FLA.

1979 DEC 15 PM 4:19

FILED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

BT INVESTMENT MANAGERS, INC. and
BANKERS TRUST NEW YORK CORPORATION,

Plaintiffs,

vs. TCA 73-184

GERALD A. LEWIS, Comptroller of the
State of Florida and Commissioner of
Banking of the State of Florida,

Defendant.

---

*OPINION*

Before RONEY, Circuit Judge, ARNOW, Chief District Judge, and STAFFORD, District Judge.

STAFFORD, District Judge.

Plaintiffs Bankers Trust New York Corporation (BTNYC) and BT Investment Managers (BTIM), have brought this action seeking a declaration that Florida Statutes § 660.10 and a portion of Florida Statutes § 659.-141(1) contravene the United States Constitution and for an injunction restraining their enforcement. Jurisdiction, which is not contested, is founded upon 28 U.S.C. §§ 1331 and 1343(3). This three-judge district court was convened pursuant to 28 U.S.C. § 2281.[1]

The case was submitted to the court upon a stipulation

of facts by the parties, and a final hearing was conducted on September 1, 1978. Upon consideration of the matters presented to the court, we hold that the challenged portion of Florida Statutes § 659.141(1), which prohibits a bank, trust company, or holding company that principally conducts its business outside the State of Florida from owning or controlling a business organization in this state which furnishes investment advisory services, violates the commerce clause, Article I, § 8, of the Constitution.[2] Similarly, we hold invalid under the commerce clause Florida Statutes § 660.10, which bars all corporations except banks and trust companies incorporated in Florida and national banks located in Florida from exercising various trust powers and duties in this state.[3] Since the determination that the subject statutes offend the commerce clause is sufficient to dispose of the controversy between the parties, we express no opinion as to the validity or invalidity of the statutes under any other constitutional theory proferred by plaintiffs.[4]

BTNYC is a corporation organized under the laws of New York and is a "bank holding company" within the meaning of the Bank Holding Company Act, 12 U.S.C. § 1841, et seq. BTIM is a corporation organized under the laws of Delaware, and is a wholly-owned subsidiary of BTNYC. BTIM qualified to do business in Florida on November 27, 1972, and plans to locate an office in the city of Palm Beach, Florida.

Defendant Gerald A. Lewis is the incumbent Comptroller and Commissioner of Banking of the State of Florida. The Florida Bankers Association (FBA or amicus) has been granted leave to appear in this action as amicus



curiae to argue, along with defendant, in favor of the validity of the challenged statutes.

The factual history of this litigation opens with the 1970 amendments to the Bank Holding Company Act, and specifically the amendment to § 4(c)(8) of the Act, 12 U.S.C. § 1843 (c)(8). Prior to 1970 § 4(c)(8) provided that a bank holding company could not acquire ownership or control of any company which is not a bank or bank holding company, except for "any company *all the activities of which are of a financial, fiduciary, or insurance nature* and which the Board [of Governors of the Federal Reserve System] . . . by order has determined to be so closely related to the business of banking or of managing or controlling banks as to be a proper incident thereto . . ." (emphasis added).

The 1970 amendment to this provision, P.L. 91-607, Title I, § 103(4), 84 Stat. 1763, significantly expanded the statutory definition of activities deemed to be "so closely related to banking . . . as to be a proper incident thereto." Deleted from the statutory language was the former limitation to activities of a "financial, fiduciary, or insurance nature." Following the amendment bank holding companies were authorized to own or control

> any company the activities of which the Board . . . has determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto. In determining whether a particular activity is a proper incident to banking or managing or controlling banks the Board shall consider whether its performance by an affiliate of a holding company can reasonably be ex-

> pected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices. In orders and regulations under this subsection, the Board may differentiate between activities commenced by the acquisition, in whole or in part, of a going concern.

12 U.S.C. § 1843(c)(8).

The statute grants the Board of Governors of the Federal Reserve System authority to adopt regulations more specifically defining those business activities "so closely related to banking . . . as to be a proper incident thereto." The Board has determined that [p]erforming or carrying on any one or more of the functions or activities that may be performed or carried on by a trust company" and "[a]cting as investment or financial advisor" are such activities. 12 C.F.R. § 225.4(a)(4) & (5).[5]

Acting on the basis of the post-1970 federal bank holding company statutes and regulations, BTNYC applied to the Board of Governors of the Federal Reserve System on October 3, 1972, for authority indirectly to engage *de novo* in the performance of investment advisory services through its subsidiary BTIM, at an office to be located in Palm Beach, Florida.

While the application was pending, the Florida Legislature, convened in special session for the purpose of considering matters unrelated to this lawsuit, also passed a bill amending Florida Statute § 659.141(1) in such a



manner as to remove BTNYC's right under state law to engage in the investment advisory business in Florida. Laws of Florida 1972, ch. 72-726. It is apparent that the bill was hurriedly enacted at the instance of the FBA and defendant's predecessor in office in response to BTNYC's application; the Board so found,[6] and defendant and the FBA have offered no evidence to the contrary.

Until passage of the amendment to § 659.141(1), that statute forbade any "bank, trust company or holding company, the operations of which are principally conducted outside [Florida]" from acquiring control over "any business organization having a place of business in [Florida] where or from which it furnishes investment advisory services *to trust companies or banks* in [Florida]" (emphasis added). The amended statute eliminated all reference to trust companies or banks, thereby extending the prohibition on the furnishing of investment advice to the giving of advice to *any* person from a place of business located in this state.

On April 26, 1973, the Board issued an order rejecting BTNYC's application. The Board's reasoning bears partial recitation here:

> Absent the recent enactment of amendments to section 659.141 and any evidence indicating that *de novo* entry in this case would have the purpose or effect of foreclosing future competition or would otherwise be contrary to the public interest, it appears likely that the Board would have approved the instant proposal. The Board recognizes, as has Congress, "that an activity commenced *de novo* will tend to have procompetitive effects, and consequently should be

> viewed more favorably than the commencement of an activity through the acquisition of an existing concern" and "where a bank holding company enters a new market *de novo* . . ., its desire to succeed in its new endeavor is more likely to be competitive". However, while the instant proposal was pending before the Board, the Florida Statutes were amended to generally prohibit the provision of investment advisory services in Florida by non-Florida-based bank holding companies through control of business organizations having offices in Florida.

Federal Reserve Board Order of April 26, 1973, 59 Fed. Res. Bull. 364, 365 (1973). Under the authority of *Whitney National Bank in Jefferson Parish* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965), and § 7 of the Bank Holding Company Act, 12 U.S.C. § 1846, the Board concluded that it was required to deny BTNYC's proposal on the ground that it was prohibited by state law.

Subsequent to the Board's order plaintiffs filed this lawsuit. Count I of the complaint asks for declaratory and injunctive relief against the operation of § 659.141(1). Count II seeks identical relief against the joint operation of §§ 659.141(1) and 660.10, which together prevent BTNYC from operating a subsidiary trust company in the State of Florida. Concerning Count II, the complaint alleges, and the parties to this lawsuit have stipulated, that,

> But for the existence of the challenged statutes, Bankers Trust New York Corporation would have applied to the Board of Governors of the Federal Reserve System, pursuant to 12 U.S.C. § 1843(c)(8) and 12 C.F.R. § 225.4(b)(1), for authority to engage,



> through a subsidiary trust company having a national bank charter or a Florida state charter, in the activity of performing or carrying on at a place of business in Florida one or more of the functions or activities that may be performed or carried on by a trust company in the manner authorized by Florida law but without the power to accept demand deposits or make commercial loans; and would have organized such a trust company under the laws of the United States or the State of Florida.

Stipulation filed May 11, 1978, at 2-3. The parties have further stipulated that the "enforcement, or threatened enforcement" of §§ 659.141(1) and 660.10" has caused [BTIM and BTNYC] injury, loss of potential profits and loss of opportunity for corporate gain." *Id.* at 3.

Turning to the merits of the present controversy, it is necessary initially to dispose of the threshold question whether the business activities prohibited by §§ 659.141(1) and 660.10 constitute interstate commerce. Defendant insists that since the challenged statutes merely forbid foreign corporations from doing business *in this state*, only *intra*-state commerce is affected.[7] This claim is unconvincing. While the phrase "interstate commerce" does not "comprehend that commerce, which is completely internal, . . . and which does not extend to or affect other states," *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824), the notion of what is "completely internal" traditionally has been strictly and narrowly confined. For a business activity to come within the scope of the commerce clause, it need only have a substantial effect on interstate commerce. *See Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Wickard*

v. *Filburn*, 317 U.S. 111 (1942). As long as such an effect on interstate commerce is shown to exist, it is immaterial whether the activity in question is itself either wholly or primarily intrastate in nature.

The necessary effect on interstate commerce has been demonstrated here even though no direct evidence to prove such an effect has been presented.[8] This conclusion is compelled, first, because of the pervasive range of federal regulation of bank holding companies and their subsidiaries through the powers vested in the federal government under the commerce clause. This extensive regulation must constitutionally be founded upon a nexus between the provision of financial services and commerce between the states. No party to this case has contended that the connection to interestate commerce of the activities involved here is so insubstantial as to rob Congress of its authority to regulate in this field.[9]

Second, the complaint alleges, and plaintiffs have contended throughout the instant proceedings, that they desire to engage in interstate commerce and that the very nature of the business they seek to conduct in Florida would necessarily implicate a substantial volume of interstate trade and communications. The typical clients plaintiffs intend to serve in the Palm Beach office of BTIM are persons vacationing in Florida who during the bulk of the year rely on BTNYC to handle their investment portfolios and who would likely wish to obtain investment advice during vacation from a Florida office of the same company. These, of course, are people who have crossed state lines in order to reach Florida. Even more significantly, the investment services rendered by plaintiffs would in the due course of business affect the stocks and securities



of numerous corporations. The continual use of interstate and international mail, telephone, and wire communications would also be a necessary part of plaintiffs' business. Taken together, these probable incidents of plaintiffs' proposed activities more than demonstrate that interstate, as well as intrastate, commerce would be affected.

The essential disputes between the parties as to the commerce clause issue are as follows. Plaintiffs charge that §§ 659.141(1) and 660.10 are blatantly undisguised protectionist measures designed to shield Florida banking, trust and investment advisory firms from free competition with foreign businesses. Consequently, plaintiffs assert, the statutes discriminate against and unduly burden interstate commerce in violation of the commerce clause.

Defendant and the FBA deny this claim and insist that §§ 659.141 and 660.10 serve significant and legitimate local interests justifying any possible burden upon interstate commerce. Furthermore, defendant and the FBA place great reliance on certain provisions of the Bank Holding Company Act which are claimed to affirmatively approve state prohibitions upon the entry into local markets of foreign bank holding companies and their subsidiaries.

The general constitutional principles governing a claim of interference with interstate commerce are well established. Although the commerce clause grants Congress the authority "[t]o regulate Commerce . . . among the several States," it has long been understood that, in the absence of conflicting federal legislation on a subject of potential regulation, the states retain a "residuum of power" to adopt their own regulations concerning that subject. *Southern*

*Pacific Co.* v. *Arizona,* 325 U.S. 761, 767 (1945). *See also Hunt* v. *Washington Apple Advertising Comm'n,* 432 U.S. 333 (1977). That power, however, must be exercised within the restraints imposed by the commerce clause, *Philadelphia* v. *New Jersey,* ____U.S.____, 57 L.Ed.2d 475, 481 (1978); *Raymond Motor Transportation* v. *Rice,* ____U.S. ____, 54 L.Ed.2d 664, 674 (1978), and must not be used to create barriers to the free passage of interstate commerce, *Cooley* v. *Board of Wardens,* 53 U.S. (12 How.) 299 (1851); *Raymond Motor Transportation, supra.* Thus, "in areas where activities of legitimate local concern overlap with the national interests expressed by the Commerce Clause—where local and national powers are concurrent—the [federal courts] in absence of congressional guidance [are]called upon to make 'delicate adjustment of the conflicting state and federal claims' H.P. Hood & Sons v. Du Mond, [336 U.S. 525, 553] 93 L.Ed. 865, 69 S Ct 657 (Black, J., dissenting)." *A & P Tea Co.* v. *Cottrell,* 424 U.S. 366, 371 (1976).

The guiding principles for effecting the necessary accomodation or balancing between competing national and state interests in light of the purpose of the commerce clause are best stated as follows:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. Huron Cement Co. v. Detroit, 362 US 440, 443, 4 L Ed 2d 852, 80 S Ct 813, 78 ALR2d 1949. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden



> that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

*Pike* v. *Bruce Church, Inc.,* 397, U.S. 137, 142 (1970). *See also Hughes* v. *Alexandria Scrap Corp.,* 426 U.S. 794 (1976); *A & P Tea Co.* v. *Cottrell, supra.*

An entirely dissimilar set of considerations come into play, however, where it appears a state statute is no more than discriminatory protectionist legislation designed to promote local business to the exclusion of interstate competition and commerce. As to regulations of this nature, the Supreme Court has flatly stated that "where simple economic protectionism is effected by state legislation, *a virtually per se rule of invalidity* has been erected." *Philadelphia* v. *New Jersey,* ____U.S.____, 57 L.Ed.2d 475, 481 (1978) (emphasis added), citing *Hood & Sons* v. *Du Mond,* 336 U.S. 525 (1949); *Toomer* v. *Witsell,* 334 U.S. 385 (1948); *Baldwin* v. *G.A.F. Seelig,* 294 U.S. 511 (1935); *Buck* v. *Kuykendall,* 267 U.S. 307 (1925). This inflexible rule is applied in order to make meaningful the constitutional concept of the United States as an economic whole, rather than a feuding collection of economically Balkanized states. As expressed in *Hood & Sons* v. *Du Mond, supra*:

> This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in Baldwin v. Seelig,

> 294 US 511, 527, "what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation."

336 U.S. at 537-38. Accordingly, the chief inquiry in the instant case is whether §§ 659.141(1) and 660.10 are "basically . . . protectionist measure[s], or whether [they] can fairly be viewed as law[s] directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Philadelphia* v. *New Jersey,* 57 L.Ed.2d at 482.

The record here, though sparse, is sufficient to indicate conclusively the discriminatory nature of the statutes under attack. By its terms Section 659.141(1) erects an insuperable barrier to the entry of foreign-based bank holding companies, through their subsidiaries, into the Florida investment advisory market. Section 660.10 similarly cordons off Florida trust companies from competition by out-of-state concerns. Thus, according to *Philadelphia* v. *New Jersey, supra,* this parochial legislation must be deemed per se unconstitutional.

Defendant and the FBA argue strenuously, however, that the statutes are justified by an overriding legislative purpose of furthering competition by preventing economically powerful out-of-state banking interests from gaining a stranglehold on the Florida market. The FBA, for example, contends the Florida Leglislature, in amending § 659.141(1), "took action designed to attain the legitimate goal of protecting the public from the threat posed by the accumulation and concentration of economic power." Reply Memorandum of Law of Amicus Curiae, at 10. Doubtlessly, regulatory statutes seeking to curb anti-



competitive abuses are within the proper exercise of the general police powers of the State of Florida. We cannot agree, however, that the mere invocation of this legitimate interest, without more, is sufficient to save discriminatory legislation of the type we deal with here.[10]

Contentions based upon the legislative purpose motivating passage of the statutes must fail primarily because they are irrelevant once the discriminatory character of a state regulation is established. In *Philadelphia* v. *New Jersey, supra,* Mr. Justice Stewart recited the principle that

> [T]he evil of protectionism can reside in legislative means as well as legislative ends. Thus, it does not matter whether the ultimate aim of ch 363 is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected. But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. Both on its face and in its plain effect, ch 363 violates this principle of nondiscrimination.

The Court has consistently found parochial legislation of this kind to be constitutionally invalid, whether the ultimate aim of the legislation was to assure a steady supply of milk by erecting barriers to allegedly ruinous competition . . . or to create jobs by keeping

> industry within the state, . . . or to preserve the State's financial resources from depletion by fencing out indigent immigrants. . . . In each of these cases, a presumably legitimate goal was sought to be achieved by the illegitimate means of isolating the State from the national economy.

57 L.Ed.2d at 483-84 (citations omitted).

Here, it is amply evident that, even if the motive of the Florida Legislature was to promote competition in this state in the affected businesses, the means chosen for doing so are impermissible. There is no evidence to suggest that foreign banks and bank holding companies or companies which principally conduct their business outside the state constitute any more of a threat to free competition in Florida than firms located in this state. The available evidence, in fact, is directly to the contrary, at least as far as § 659.141(1) is concerned. The Board of Governors of the Federal Reserve System determined that, if it were not for the amendment of § 659.141(1), BTNYC's application to engage in the investment advisory business through its subsidiary BTIM would have been approved. By law, this determination may only have been made upon a finding by the Board that the business activity sought to be performed by plaintiffs could "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interest, or unsound banking practices." 12 U.S.C. § 1843 (c)(8). The Board specifically found there was no evidence plaintiffs' entry into the investment advisory field would harm competition and concluded that plaintiffs'



proposed business would tend to have pro-competitive effects. 59 Fed.Res.Bull. at 365.

Florida unquestionably may act by legislation to control or prevent undue concentrations of economic power in the banking, investment and trust businesses. In order not to run afoul of the commerce clause, though, this legislation must impact evenhandedly upon in-state and out-of-state firms alike. Sections 659.141(1) and 660.10 place the full weight of the purported state concern for competition upon foreign companies, leaving unchecked any possible abuses by Florida companies. Where, as here, there is no evidence beyond simple speculation that foreign companies pose any greater danger to competition than do Florida firms, the former may not be singled out for prohibition. Defendant and the FBA have not attempted to demonstrate that non-discriminatory alternatives to the statutes challenged here would be unavailable or ineffective, *A&P Tea Co.* v. *Cottrell,* 424 U.S. 366 (1976); *Dean Milk Co.* v. *Madison,* 340 U.S. 349 (1951); indeed, the State of Florida possesses broad authority under its police powers to regulate the business activities of both Florida and non-Florida companies in this state to ensure that competition is fostered.

Moreover, the record is replete with indications that the legislative intent behind § 659.141(1), if not § 660.10, was to discriminate against interstate commerce. While no official record of legislative history or statement of legislative purpose accompanied the passage of either statute, the order of the Board of Governors of the Federal Reserve System in this case recounts the telling circumstances under which the bill amending § 659.141(1) was passed. The Board stated, "There appears to be tacit agreement that

the recently-enacted legislation was intended to, and does, prohibit the performance of investment advisory services in Florida by non-Florida bank holding companies." 59 Fed. Res. Bull. at 365.[11] The Board further determined that, "It is beyond question, and BTNYC and the protestants are in agreement, that the notice that BTNYC published in Sepember, 1972, triggered the action of the Florida legislature in this case and that the newly-enacted legislation was primarily motivated by the threat of BTNYC's entry into the Florida investment advisory markets and was intended to prevent such entry." 59 Fed. Res. Bull. at 366.

The Board also found that the legislation had been passed at the urging of the FBA and defendant's predecessor in office, a highly significant circumstance in determining whether discrimination against interstate commerce exists. As expressed in *Hunt* v. *Washington State Apple Advertising Comm'n, supra:*

> Despite the statute's facial neutrality, the Commission suggests that its discriminatory impact on interstate commerce was not an unintended by product and there are some indications in the record to that effect.
>
> The most glaring is the response of the North Carolina Agriculture Commissioner to the Commission's request for an exemption following the statute's passage in which he indicated that before he could support such an exemption he would "want to have the sentiment from our apple producers *since they were mainly responsible for this legislation being passed. . . .*"

432 U.S. at 352 (emphasis added).



The final argument interposed by defendant and the FBA in favor of the validity of §§ 659.141(1) and 660.10 is that Congress, through certain provisions of the Bank Holding Company Act, 12 U.S.C. § 1841 et seq., has affirmatively consented to Florida's prohibition on the entry of foreign bank holding companies and their subsidiaries into this state. It has long been held that Congress, under its powers over interstate commerce, may legitimately approve regulations by the states that would otherwise violate the commerce clause. *See, e.g., Prudential Insurance Co.* v. *Benjamin,* 328 U.S. 408 (1946). Defendant and the FBA specifically rely here upon 12 U.S.C. §§ 1842(d) and 1846 as constituting congressional authority for the discriminations against interstate commerce effected by the state laws being challenged.

Of the two federal statutes, § 1846 is the more easily disposed of. It provides:

> The enactment by the Congress of the Bank Holding Company Act of 1956 shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

This language accomplishes nothing more than to assure that the states will not be deemed dispossessed of whatever regulatory authority they exercised over banks and bank holding companies prior to passage of the Bank Holding Company Act. In no wise does it pass on to the states the power to adopt regulations on any subject which would otherwise be contrary to the commerce clause. The remarks of the Fifth Circuit in the recent case of *Great Western*

*United Corp.* v. *Kidwell*, 577 F.2d 1256 (5th Cir. 1978), are both instructive and dispositive:

> When Congress has exempted state laws from commerce clause restrictions it has used language specifically directing that certain interstate commerce may be regulated as though it were purely local. See, e.g., the Wilson Act of 1890, 26 Stat. 313. Congress has also stated that, in the absence of affirmative Congressional action, courts should impose no barriers on state regulation. See the McCarran-Ferguson Act, 59 Stat. 33, 15 U.S.C. § 1011 et seq. The language in § 28 of the 1934 Act is notably different from these acknowledged examples of Congressional consent. Rather than allowing violations of the commerce clause, § 28 appears to direct only that federal securities law should not be interpreted as a wholesale displacement of state securities regulation.

*Id.* at 1281. Similarly, 12 U.S.C. § 1846 does not explicitly speak to exempting state banking and bank holding company regulations from the limitations of the commerce clause, and no such exemption should be read into the statute by this court.

Section 1842(d) of Title 12 is of no greater avail to defendant and amicus than is § 1846. That section reads:

> (d) Limitation by State boundaries. Notwithstanding any other provision of this section, no application shall be approved under ths section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of



> any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, unless the asquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

By its terms § 1842(d) prohibits a bank holding company from acquiring an additional *bank* in any state in which the business of its subsidiaries is not principally conducted. It does not specifically consent to any state's attempt to bar out-of-state bank holding companies from acquiring other companies within that state which are engaged in activities "so closely related to banking or managing or controlling banks as to be a proper incident thereto," within the meaning of 12 U.S.C. § 1843(c)(8).

Defendant and amicus argue, however, that the ability to prohibit the acquisition of banks within a particular state must necessarily carry with it the abilty to prohibit the acquisition of companies involved in closely related activities. Otherwise, they claim, a "loophole" would be created allowing bank holding companies to expand their operations into non-consenting states despite the congressional mandate giving the states power to exclude them. Defendant and the FBA draw support from the

original congressional purpose behind enactment of the Bank Holding Company Act in 1956, that being to limit the concentration of economic power in the hands of bank holding companies. *See Alabama Ass'n of Insurance Agents* v. *Board of Governors*, 533 F.2d 224, 231 (5th Cir. 1976).

This argument disregards both the plain meaning of the statute and the most recent expressions of congressional intent. The legislative histories of the Bank Holding Company Act and the 1966 and 1970 amendments to the Act contain nothing to support the conclusion that a state's authority to forbid foreign companies from acquiring banks within that state includes the right also to forbid them from acquiring companies offering services closely related to banking. Moreover, although defendant and amicus are correct concerning the general intent of the Act (preventing the concentration of financial power by bank holding companies), the purpose of the 1970 amendments runs counter to their arguments. The 1970 amendments permit a bank holding company to obtain "any company the activities of which . . . are so closely related to banking . . . as to be a proper incident thereto," and not just companies "all the activities of which are of a financial, fiduciary, or insurance nature," as the Act provided prior to 1970. The congressional history of the amendments makes clear that Congress in 1970 intended to expand the range of business activities in which bank holding companies could engage, giving them greater flexibility and latitude. *See National Courier Association* v. *Board of Governors*, 516 F.2d 1229, 1236-37 (D.C. Cir. 1975); Chase, *The Emerging Financial Conglomerate: Liberalization of the Bank Holding Company Act*, 60 Geo. L.J. 1225 (1972); Comment, *Implementation of the Bank Holding Company Act Amendments*



*of 1970: The Scope of Banking Activities*, 71 Michigan L. Rev. 1970 (1973); Legislation Note, *The Bank Holding Company Act Amendments of 1970*, 39 Geo. Wash. L. Rev. 1200 (1971). The Florida statutes at issue here, by drastically curtailing the rights of foreign bank holding companies and their subsidiaries to engage in banking-related businesses in this state, are at least inconsistent with, if not contrary to, the desires of Congress.

In addition, it is difficult to read § 1842(d), which specifically consents only to state prohibition of the acquisition of *banks* by out-of-state holding companies, as authorizing prohibition of the acquisition of banking-related businesses. "Bank", as used in the Bank Holding Company Act, is a term of art with a definite meaning: "Any institution . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." 12 U.S.C. § 1841(c). If Congress had intended to allow state prohibition of the acquisition of non-banking subsidiaries, it could easily have so provided; since § 1842(d) refers only to "banks," the plain meaning of its language must prevail. Thus, § 1842(d) contains no authority for concluding that a state may bar foreign bank holding companies from acquiring non-banking subsidiaries, as well as banks, within its jurisdiction.

In holding that Florida Statutes § 660.10 and a portion of Florida Statutes § 659.141(1) are unconstitutional, we intend no disparagement of the traditional authority of Florida and all other states under their police powers to fairly and evenhandedly regulate banks, bank holding companies, trust companies and like financial institutions. As amicus has so vigorously pointed out, the banking

trade historically has been subject to a system of dual federal and state regulation, a system which Congress has endeavored to preserve over the years. Sections 1842(d) and 1846 of Title 12, and similar laws, represent the statutory embodiment of this national policy. Nevertheless, when Congress, in the exercise of its paramount authority over commerce, has not explicitly countenanced the type of overt discrimination against interstate commerce involved in this case, the judiciary must intervene in order to ensure that the freedom of trade between the states guaranteed by the commerce clause is protected.[12]

Accordingly, an order will issue declaring that Florida Statutes § 660.10 and the affected portion of Florida Statutes §659.141(1) are invalid as violative of the commerce clause and enjoining the further enforcement of § 659.141 (1) against plaintiffs. Since plaintiffs have yet to attempt to establish a trust company subsidiary in Florida, injunctive relief barring the enforcement of Florida Statutes § 660.10 would be premature, and therefore inappropriate, at this time.

*FOOTNOTES* TCA 73-184

1. This action was filed on October 24, 1973, and thus the propriety of empanelling a three-judge court was unaffected by the repeal of 28 U.S.C. § 2281 in 1976. Pub. L. 94-381, Aug. 12, 1976, 90 Stat. 1119.

2. The pertinent portion of Florida Statutes § 659.141(1) provides:

> (1) Except as provided in subsection (3) of this section, no bank, trust company, or holding company, the operations of which are principally conducted outside this state, shall acquire, retain, or own, directly or indiectly, all or substantially all the assets of, or control over, any bank or trust company having a place of business in this state where the business of banking or trust business or functions are conducted, or acquire, retain, or own all or substantially all of the assets of, or control over, any business organization having a place of business in this state where or from which it furnishes investment advisory services in this state.



3. Florida Statutes §660.10 provides:

> All corporations except banks and trust companies incorporated under the laws of this state and having trust powers and except national banking associations located in this state and having trust powers, are prohibited from exercising any of the powers or duties and from acting in any of the capacities, within this state, as follows:
>
> (1) As executor or administrator of the estate of any decedent, whether such decedent was a resident of this state or not, and whether the administration of the estate of such decedent be original or ancillary; provided, that if the executor or administrator of the estate of a nonresident decedent be a corporation duly authorized, qualified and acting as such executor or administrator in the jurisdiction of the domicile of the decedent, it may, as a foreign executor or administrator perform such duties and exercise such powers and privileges as are required, authorized or permitted by s. 734.30.
>
> (2) As guardian of any infant, insane person or person physically or mentally incompetent whether domiciled in this state or not.
>
> (3) As trustee under any will or other testamentary instrument, provided any corporation that is authorized to act as trustee under the laws of the place where it has its principal place of business may receive bequests as trustee of money or intangible personal property and devises of real property located in Florida and may sell, transfer and convey the property.
>
> (4) As trustee of any real estate in this state or any interest

therein under any agreement whereby the beneficial interest in such property is vested in others.

(5) As trustee under any deed of trust or other instrument executed after June 10, 1937, conveying or encumbering any real or tangible personal property in this state given to secure bonds or other evidence of indebtedness unless in such deed of trust or other instrument a trust company or bank having trust powers and located in this state or an individual residing in this state shall be named as cotrustee; and no suit shall be brought to foreclose any such deed of trust or other instrument unless such cotrustee or successor cotrustees of like qualifications be a party plaintiff.

(6) As receiver or trustee under appointment of any court in this state.

(7) As assignee, receiver or trustee of any insolvent person or corporation or under any assignment for the benefit of creditors.

(8) As fiscal agent, transfer agent or registrar of any municipal or private corporation, provided that this prohibition shall not be so construed as to prevent banks and trust companies not located in this state from acting within the state where located as fiscal agent, transfer agent or registrar of municipal or private corporations of this state; provided further, however, that nothing herein shall prevent any Florida corporation not a bank or trust company and not having trust powers from being its own fiscal agent, transfer agent or registrar concerning its own affairs, stock or securities. Provided, however, that nothing in this section or in any other law of this state shall be construed to prohibit a foreign bank or foreign trust company as trustee of any charitable foundation or endowment, employees' pension, retirement or profit-sharing trust, alone or together with a cotrustee from: Contracting in this state or elsewhere with any person to acquire from such person a part or the entire interest in a loan which such person proposes to make, has heretofore made or hereafter makes, together with a like interest in any security instrument cover-



ing real or personal property in the state proposed to be given or hereafter or heretofore given to such person to secure or evidence such loan; servicing directly or entering into servicing contracts with persons, and enforcing in his state the obligations heretofore or hereafter acquired by it in the transaction of business outside of this state or in the transaction of any business authorized or permitted hereby; or acquiring, holding, leasing, mortgaging, contracting with respect to, or otherwise, protecting, managing, or conveying property in this state which has heretofore or may hereafter be assigned, transferred, mortgaged or conveyed to it as security for, or in whole or in part in satisfaction of, a loan or loans made by it or obligations acquired by it in the transaction of any business authorized or permitted hereby; provided, further, that no such foreign bank or trust company shall be deemed to be transacting business in this state, or be required to qualify so to do, or to be unlawfully exercising powers or duties or acting in an unlawful or prohibited capacity or to be violating any of the provisions of this section or of any other law of this state, solely by reason of the performance of any of the acts of business hereinbefore permitted or authorized hereby; and provided, further, that nothing herein shall be construed as authorizing or permitting any foreign bank or trust company to maintain an office within this state.

It should be noted that both Florida Statutes § 660.10 and Florida Statutes § 659.141 are affected by the Florida Regulatory Reform Act of 1976, Florida Laws 1976, ch. 760178, Florida Statutes § 11.61, and are slated to be repealed effective July 1, 1980, unless the Legislature decides prior to January 1, 1980 to retain them.

4. In addition to the commerce clause the complaint alleges three other constitutional grounds upon which the statutes are said to be invalid: (1) denial of equal protection; (2) denial of substantive due process; and (3) violation of the supremacy clause, Article VI, clause 2. Plaintiffs abandoned reliance on the last two of these contentions prior to the final hearing in this case.

5. 12 C.F.R. § 225.4(a)(4) & (5) provides in relevant part:

(a) . . . The following activities have been determined by the Board to be so closely related to banking or managing or controlling banks as to be a proper incident thereto: . . .

(4) Performing or carrying on any one or more of the functions or activities that may be performed or carried on by a trust company (including activities of a fiduciary, agency, or custodian nature), in the manner authorized by Federal or State law, so long as the institution does not make loans or investments or accept deposits other than (i) deposits that are generated from trust funds not currently invested and are properly secured to the extent required by law, or (ii) deposits representing funds received for a special use in the capacity of managing agent or custodian for an owner of, or investor in, real property, securities, or other personal property, or for such owner or investor as agent or custodian of funds held for investment or escrow agent, or for an issuer of, or broker or dealer in securities, in a capacity such as paying agent, dividend disbursing agent, or securities clearing agent, and not employed by or for the account of the customer in the manner of a general purpose checking account or bearing interest, or (iii) making of call loans to securities dealers or purchase of money market instruments such as certificates of deposit, commercial paper, government or municipal securities, and bankers acceptances (such authorized loans and investments, however, may not be used as a method of channeling funds to nonbanking affiliates of the trust company);

(5) Acting as investment or financial advisor to the extent of (i) serving as the advisory company for a mortgage or a real estate investment trust; (ii) serving as investment adviser, as defined in section 2(a)(20) of the Investment Company Act of 1940, to an investment company registered under that Act; (iii) providing portfolio investment advice to any other person; (iv) furnishing general economic information and advice, general economic statistical forecasting services and industry studies, and (v) providing financial advice to State and local governments, such as with respect to the issuance of their securities.



6. *See* Federal Reserve Board Order of April 26, 1973, 59 Fed. Res. Bull. 364, 366 (1973).

7. The FBA does not join in this contention, and its memoranda of law appear to concede that matters involving interstate commerce are at issue in this litigation.

8. The absence of direct evidence is attributable to the fact that the challenged statutes forbid plaintiffs from engaging in business, and thus there is no factual background to demonstrate what the actual effect of plaintiffs' proposed activities on interstate commerce would be.

9. *Katzenbach* v. *Morgan, Wickard* v. *Filburn,* and most other cases which hold that a business activity need only have a "substantial effect" on interstate commerce in order to come within the parameters of the commerce clause have dealt with the permissible extent of federal regulation. It might be questioned whether the commerce clause ought to be accorded a more confined scope where the issue at hand is whether to restrict or forbid state regulation of the incidents of commerce, thus allowing the states greater legislative leeway. The Supreme Court, in *Philadelphia* v. *New Jersey,* ____U.S.____, 57 L.Ed.2d 475, 480-81 (1978), specifically rejected this "two-tiered definition" of commerce. The court there concluded that the states are subject to "Constitutional scrutiny" whenever they attempt to enter any regulatory field in which Congress has power to regulate under the commerce clause. *Id.* at 481.

10. Where a state statute is challenged as violative of the commerce clause, a federal court is not permitted merely to assume that the statute serves an asserted state interest, as may be done when the court is confronted with an equal protection challenge to state regulation, *McGowan* v. *Maryland,* 366 U.S. 420, 426 (1961). "The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation is not to be avoided by 'simply invoking the convenient apologetics of the police power,' Kansas City Southern R.Co. v. Kaw Valley Dis-

trict,[233 U.S. 75], 79; Buck v. Kuykendall, 267 U.S. 307, 315." *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761 (1945). *See also Raymond Motor Transportation* v. *Rice,* ____*U.S.*____, 54 L.Ed. 2d 664, 675-78 (1978).

11. In its opinion in this case the Fifth Circuit Court of Appeals was even more blunt in its appraisal of the purpose and effect of Florida Statutes § 659.141(1), terming it "a brazen attempt to prevent out-of-state competition." *BT Investment Managers, Inc.* v. *Lewis,* 559 F.2d 950,954 n. 13 (1977).

12. We recognize, too, as defendant and amicus have noted, that many other states have passed laws similar in nature to § 660.10. *See* Annotation, *Eligibility of Foreign Corporation to Appointment as Executor, Administrator, or Testamentary Trustee,* 26 ALR 3d 1019 (1969). In addition, § 660.10 has survived on the statute books without constitutional challenge for approximately 50 years. A statute's longevity or commonplace nature, however, is an insufficient rationale for justifying its demonstrated discrimination against interstate commerce.

# APPENDIX C

## *STATUTES AND RULES*

1. The pertinent portion of Florida Statutes § 659.141 (1) provides:

> (1) Except as provided in subsection (3) of this section, no bank, trust company, or holding company, the operations of which are principally conducted outside this state, shall acquire, retain, or own, directly or indirectly, all or substantially all the assets of, or control over, any bank or trust company having a place of business in this state where the business of banking or trust business or functions are conducted, or acquire, retain, or own all or substantially all of the assets of, or control over, any business organization having a place of business in this state where or from which it furnishes investment advisory services in this state.

2. Florida Statutes § 660.10 provides:

> All corporations except banks and trust companies incorporated under the laws of this state and having trust powers and except national banking associations located in this state and having trust powers, are prohibited from exercising any of the powers or duties and from acting in any of the capacities, within this state as follows:
>
> (1) As executor or administrator of the estate of any decedent, whether such decedent was a resident of this state or not, and whether the administration of the estate of such decedent be original or ancillary; provided, that if the executor or administrator of the

estate of a nonresident decendent be a corporation duly authorized, qualified and acting as such executor or administrator in the jurisdiction of the domicle of the decedent, it may, as a foreign executor or administrator perform such duties and exercise such powers and privileges as are required, authorized or permitted by § 734.30.

(2) As guardian of any infant, insane person or person physically or mentally incompetent whether domiciled in this state or not.

(3) As trustee under any will or other testamentary instrument, provided any corporation that is authorized to act as trustee under the laws of the place where it has its principal place of business may receive bequests as trustee of money or intangible personal property and devises of real property located in Florida and may sell, transfer and convey the property.

(4) As trustee of any real estate in this state or any interest therein under any agreement whereby the beneficial interest in such property is vested in others.

(5) As trustee under any deed of trust or other instrument executed after June 10, 1937, conveying or encumbering any real or tangible personal property in this state given to secure bonds or other evidence of indebtedness unless in such deed of trust or other instrument a trust company or bank having trust powers and located in this state or an individual residing in this state shall be named as cotrustee; and no suit



shall be brought to foreclose any such deed of trust or other instrument unless such cotrustee or successor cotrutees of like qualifications be a party plaintiff.

(6) As receiver or trustee under appointment of any court in this state.

(7) As assignee, receiver or trustee of any insolvent person or corporation or under any assignment for the benefit of creditors.

(8) As fiscal agent, transfer agent or registrar of any municipal or private corporation, provided that this prohibition shall not be so construed as to prevent banks and trust companies not located in this state from acting within the state or registrar of municipal or private corporations of this state; provided further, however, that nothing herein shall prevent any Florida corporation not a bank or trust company and not having trust powers from being its own fiscal agent, transfer agent or registrar concerning its own affairs, stock or securities. Provided, however, that nothing in this section or in any other law of this state shall be construed to prohibit a foreign bank or foreign trust company as trustee of any charitable foundation or endowment, employees' pension, retirement or profit-sharing trust, alone or together with a cotrustee from: Contracting in this state or elsewhere with any person to acquire from such person a part or the entire interest in a loan which such person proposes to make, has heretofore made or hereafter makes, together with a like interest in any security instrument covering real or personal property in the state proposed to be given or hereafter or heretofore given to

such person to secure or evidence such loan; servicing directly or entering into servicing contracts with persons, and enforcing in his state the obligations heretofore or hereafter acquired by it in the transaction of business outside of this state or in the transaction of any business authorized or permitted hereby; or acquiring, holding, leasing, mortgaging, contracting with respect to, or otherwise, protecting, managing, or conveying property in this state which has heretofore or may hereafter be assigned, transferred, mortgaged or conveyed to it as security for, or in whole or in part in satisfaction of, a loan or loans made by it or obligations acquired by it in the transaction of any business authorized or permitted hereby; provided, further, that no such foreign bank or trust company shall be deemed to be transacting business in this state, or be required to qualify so to do, or to be unlawfully exercising powers or duties or acting in an unlawful or prohibited capacity or to be violating any of the provisions of this section or of any other law of this state, solely by reason of the performance of any of the acts of business hereinbefore permitted or authorized hereby; and provided, further, that nothing herein shall be construed as authorizing or permitting any foreign bank or trust company to maintain an office within this state.

3. 12 U.S.C. § 1842(d) provides:

(d) Limitation by State boundaries. Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting



shares of, interest in, or all of substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on the effective date of this amendment [enacted July 1, 1966] or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

4. The relevant portion of 12 U.S.C. § 1843 provides:

§ 1843. Interests in nonbanking organizations (a) Ownership or control of voting shares of any company not a bank; engagement in activities other than banking. Except as otherwise provided in this Act no bank holding company shall—

(1) after the date of enactment of this Act [enacted May 9, 1956], acquire direct or indirect ownership or control of any voting shares of any company which is not a bank, or

(2) after two years from the date as of which it becomes a bank holding company, or in the case of a company which has been continuously affiliated since May 15, 1955, with a company which was registered under the Investment Company Act of 1940, prior to

May 15, 1955, in such a manner as to constitute an affiliated company within the meaning of that Act, after December 31, 1978, or, in the case of any company which becomes, as a result of the enactment of the Bank Holding Company Act Amendments of 1970, a bank holding company on the date of such enactment [enacted Dec. 31, 1970], after December 31, 1980, retain direct or indirect ownership or control of any voting shares of any company which is not a bank or bank holding company or engage in any activities other than (A) those of banking or of managing or controlling banks and other subsidiaries authorized under this Act or of furnishing services to or performing services for its subsidiaries, and (B) those permitted under paragraph (8) of subsection (c) of this section subject to all the conditions specified in such paragraph or in any order or regulation issued by the Board under such paragraph: . . . (c) Exempt tions. The prohibitions in this section shall not apply to (i) any company that was on January 4, 1977, both a bank holding company and a labor, agricultural, or horticultural organization exempt from taxation under section 501 of the Internal Revenue Code of 1954 [26 USCS § 501], or to any labor, agricultural, or horticultural organziation to which all or substantially all of the assets of such company are hereafter transferred, or (ii) a company covered in 1970 more than 85 per centum of the voting stock of which was collectively owned on June 30, 1968, and continuously thereafter, directly or indirectly, by or for members of the same family, or their spouses, who are lineal descendants of common ancestors; and such prohibitions shall not, with respect to any other bank holding company, apply to—



(8) shares of any company the activities of which the Board after due notice and opportunity for hearing has determined (by order or regulation) to be so closely related to banking or managing or controlling banks the Board shall consider whether its performance by an affiliate of a holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices. In orders and regulations under this subsection, the Board may differentiate between activities commenced de novo and activities commenced by the acquisition, in whole or in part, of a going concern;

5. 12 U.S.C. § 1846 provides:

§ 1846. Reservation of rights to States. The enactment by the Congress of the Bank Holding Company Act of 1956 shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof. (May 9, 1956, c. 240 § 7, 70 Stat 138).

6. 12 C.F.R. § 225.4(a)(4) and (5) provides in relevant part:

> (a) . . . The following activities have been determined by the Board to be so closely related to banking or managing or controlling banks as to be a proper incident thereto: . . .

(4) Performing or carrying on any one or more of the functions or activities that may be performed or carried on by a trust company (including activities of a fiduciary, agency, or custodian nature), In the manner authorized by Federal or State law, so long as the institution does not make loans or investments or accept deposits other than (i) deposits that are generated from trust funds not currently invested and are properly secured to the extent required by law, or (ii) deposits representing funds received for a special use in the capacity of managing agent or custodian for an owner of, or investor in, real property, securities, or other personal property, or for such owner or investor as agent or custodian of funds held for investment or escrow agent, or for an issuer of, or broker or dealer in securities, in a capacity such as paying agent, dividend disbursing agent, or securities clearing agent, and not employed by or for the account of the customer in the manner of a general purpose checking account or bearing interest, or (iii) making of call loans to securities dealers or purchase of money market instruments such as certificates of deposit, commercial paper, government or municipal securities, and bankers acceptances (such authorized loans and investments, however, may not be used as a method of channeling funds to nonbanking affiliates of the trust company);

(5) Acting as investment or financial adviser to the extent of (i) serving as the advisory company for a mortgage or a real estate investment trust; (ii) serving as investment adviser, as defined in section 2(a)(20) of the Investment Company Act of 1940,



to an investment company registered under that Act; (iii) providing portfolio investment advise to any other person; (iv) furnishing general economic information and advice, general economic statistical forecasting services and industry studies, and (v) providing financial advice to State and local governments, such as with respect to the issuance of their securities.

# APPENDIX D

D1

Judgment on Decision by the Court

UNITED STATES DISTRICT COURT
for the
NORTHERN DISTRICT OF FLORIDA
Tallahassee Division

Civil Action File No. TCA 73-184

BT INVESTMENT MANAGERS, INC. and
BANKERS TRUST NEW YORK CORPORATION

vs.

GERALD A. LEWIS, Comptroller of the
State of Florida and Commissioner of
Banking of the State of Florida

This action came on for hearing before the Court, Honorable Paul H. Roney, United States Circuit Judge; Honorable Winston E. Arnow, Chief United States District Judge; and Honorable William Stafford, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged

That defendant's motion for clarification, reconsideration and to alter and amend judgment, be and the same hereby is GRANTED IN PART. This court's order of December 15, 1978 is altered to read:

> In accordance with the opinion of the court entered this date, it is hereby declared that Florida Statutes § 660.10 (1977) and the first sentence of Florida

Statutes § 659.141(1) (1977), excluding that portion which prohibits a bank, trust company, or holding company, the operations of which are principally conducted outside this state, from acquiring, owning or controlling a bank having a place of business in this state, are unconstitutional as violative of Article I, § 8 of the United States Constitution. Defendant and his officers, agents, and employees are hereby permanently enjoined from enforcing against plaintiffs the aforesaid portion of the first sentence of Florida Statutes § 659.141(1)(1977).

The motion is DENIED in all other respects.

Dated on this 22nd day of March, 1979.

MARVIN S. WAITS, Clerk
By /s/ Ma'Su Sweeney
Deputy Clerk

OFFICE OF THE CLERK
U.S. DISTRICT CT.
NORTH DIST., FLA.
TALLAHASSEE, FLA.

1979 MAR 22 PM 4:17

FILED

## APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

BT INVESTMENT MANAGERS, INC.
and BANKERS TRUST NEW YORK
CORPORATION,

Plaintiffs,

vs. TCA 73-184

GERALD A. LEWIS, Comptroller of
the State of Florida and
Commissioner of Banking of the
State of Florida, *ORDER*

Defendant.

---

Defendant has filed a motion for clarification, reconsideration, and to alter and amend judgment. Upon consideration of said motion, the court notes that the order dated December 15, 1978 appears to grant relief broader in scope than that warranted by the opinion of the same date. Accordingly, the order is clarified as set out below.

OFFICE OF CLERK
U.S. DISTRICT C
NORTH DIST., FLA.
TALLAHASSEE, FLA.

1979 MAR 22 PM 2:32

FILED

The remainder of defendant's motion and the memoranda of defendant and amicus in support of the motion rely chiefly upon language found in *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168 (1869), and *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562 (1949), to the effect that a state may wholly exclude foreign corporations from doing business in the state. As expressed in *Wheeling Steel*:

> Under long-settled principles of our Federation, Ohio was not required to admit these foreign corporations to carry on intrastate business within its borders. The state may arbitrarily exclude them or may license them upon any terms it sees fit, apart from exacting surrender of rights derived from the Constitution of the United States. Hanover F. Ins. Co. v. Harding, 272 U.S. 494, 507, 7 L.Ed. 372, 379, 47 S.Ct. 179; Connecticut Gen. L. Ins. Co. v. Johnson, 303 U.S. 77, 79, 80, 82 L.Ed. 673, 676, 677, 58 S. Ct. 436.

337 U.S. at 571. The very language relied upon by defendand and amicus, however, belies their argument, for *Wheeling Steel* clearly holds that a state may exclude foreign corporations *so long as* the state does not breach any specific constitutional limitations upon its power to act, such as the commerce clause. It is well established "that a corporation authorized by the State of its creation to engage in interstate commerce 'may not be prevented by another State from coming into its limits for all the legitimate purposes of such commerce.'" *Sioux Remedy Co.* v. *Cope*, 235 U.S. 197, 203-04 (1914), *quoting Western Union Telegraph Co.* v. *Kansas*, 216 U.S. 1, 27 (1909); *accord, Hanover Insurance Co.* v. *Harding*, 272 U.S. 494, 507 (1926); *Looney* v. *Crane Co.*, 245 U.S. 178, 188 (1917).



Accordingly, it is

ORDERED AND ADJUDGED that defendant's motion for clarification, reconsideration and to alter and amend judgment be, and the same hereby is GRANTED IN PART. This court's order of December 15, 1978 is altered to read:

> In accordance with the opinion of the court entered this date, it is hereby declared that Florida Statutes § 660.10 (1977) and the first sentence of Florida Statutes § 659.141(1) (1977), excluding that portion which prohibits a bank, trust company, or holding company, the operations of which are principally conducted outside this state, from acquiring, owning or controlling a bank having a place of business in this state, are unconstitutional as violative of Article I, § 8 of the United States Constitution. Defendant and his officers, agents, and employees are hereby permanently enjoined from enforcing against plaintiffs the aforesaid portion of the first sentence of Florida Statutes § 659.141(1) (1977). The clerk of the court is directed to enter judgment accordingly.

The motion is DENIED in all other respects.

DONE AND ORDERED this 22nd day of March, 1979.

/s/ Paul H. Roney
PAUL H. RONEY
CIRCUIT JUDGE

/s/ Winston E. Arnow
WINSTON E. ARNOW
CHIEF DISTRICT JUDGE

E4

/s/ William Stafford
WILLIAM STAFFORD
DISTRICT JUDGE

# APPENDIX F

F1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

| | |
|---|---|
| BT INVESTMENT MANAGERS, INC. AND BANKERS TRUST NEW YORK CORPORATION,<br><br>PLAINTIFFS,<br><br>VS.<br><br>GERALD A. LEWIS, COMPTROLLER OF THE STATE OF FLORIDA AND COMMISSIONER OF BANKING OF THE STATE OF FLORIDA,<br><br>DEFENDANT. | CIVIL ACTION NO. TCA 73-184 |

## NOTICE OF APPEAL TO THE SUPREME COURT *OF THE UNITED STATES*

Notice is hereby given that GERALD A. LEWIS, Comptroller of the State of Florida, the defendant above named, hereby appeals to the Supreme Court of the United States from the Final Order declaring Florida Statutes § 660.10 (1977) and a portion of the first sentence of Florida Statute § 659.141(1) (1977), unconstitutional as violative of Article I, § 8 of the United States Constitution, and enjoining defendant from enforcing against plaintiffs the aforesaid portion of the first sentence of Florida Statutes § 659.141(1) (1977), entered in this action on December 15, 1978, and as altered and amended on March 22, 1979.

This appeal is taken pursuant to 28 U.S.C. § 1253.

A notice of appeal to the United States Court of Appeal for the Fifth Circuit was filed by defendant on April 20, 1979, which was a protective appeal should the United States Supreme Court decide it does not have jurisdiction to hear the entire case. A Motion to Stay Further Proceedings in Appeal is simultaneously being filed in the United States Court of Appeals for the Fifth Circuit.

Dated: May 11, 1979

/s/ Eugene J. Cella
EUGENE J. CELLA
Counsel for Defendant-Appellant
General Counsel
Office of the Comptroller
The Capitol
Tallahassee, Florida 32301
(904) 488-9355

/s/ Franklyn J. Wollett
FRANKLYN J. WOLLETT
Counsel for Defendant-Appellant
Assistant General Counsel
Office of the Comptroller
The Capitol
Tallahassee, Florida 32301
(904) 488-9896

OFFICE OF THE CLERK
U.S. DISTRICT CT.
NORTH DIST., FLA.
TALLAHASSEE, FLA.
79 MAY 11 PM 3:48
FILED



*PROOF OF SERVICE*

I, Franklyn J. Wollett, one of the attorneys for GERALD A. LEWIS, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on *11* day of May, 1979, pursuant to Rule 33, Rules of the Supreme Court, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

1. On BT INVESTMENT MANAGERS, INC., and BANKERS TRUST NEW YORK CORPORATION, Appellees, by depositing such copies in the United States Post Office, Tallahassee, Florida, with first class postage prepaid, properly addressed to Appellees counsel of record, John E. Mathews, Jr., Esquire and Stephen E. Day, Esquir of Mathews, Osborne, Ehrlich, McNott, Gobelman and Cobb, at 1500 American Heritage Building, Jacksonville, Florida 32202;

2. On Florida Bankers Association, Amicus Curiae, by depositing such copy in the United States Post Office, Tallahassee, Florida, with first class postage prepaid, properly addressed to its counsel of record, J. Thomas Cardwell, Esquire, of Akerman, Senterfit and Eidson, 17th Floor, CNA Building, Post Office Box 231, Orlando, Florida 32802.

All parties required to be served have been served.

Dated: May 11, 1979.

/s/ Franklyn J. Wollett
FRANKLYN J. WOLLETT
Counsel for Defendant
Office of the Comptroller
The Capitol
Tallahassee, Florida 32301
(904) 488-9896

*PROOF OF SERVICE*

I, Franklyn John Wollett, one of the attorneys for GERALD A. LEWIS, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 9 day of July, 1979, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Jurisdictional Statement on the several parties thereto, as follows:

1. On BT INVESTMENT MANAGERS, INC., and BANKERS TRUST NEW YORK CORPORATION, Appellees, by depositing such copies in the United States Post Office, Tallahassee, Florida, with first class postage prepaid, properly addressed to Appellees counsel of record, John E. Mathews, Jr., Esq. and Stephen E. Day, Esq. of Mathews, Osborne, Ehrlich, McNott, Gobelman and Cobb, at 1500 American Heritage Life Building, Jacksonville, Florida, 32202;

2. On Florida Bankers Association, Amicus Curiae, by depositing such copy in the United States Post Office, Tallahassee, Florida, with first class postage prepaid, properly addressed to its counsel of record, J. Thomas Cardwell, Esq., of Akerman, Senterfitt and Eidson, 17th Floor, CNA Building, Post Office Box 231, Orlando, Florida, 32802.

All parties required to be served have been served.

Dated: July 9th 1979. Franklyn J Wollett

Franklyn J. Wollett
Counsel for Defendant
Office of the Comptroller
The Capitol
Tallahassee, Florida 32301
(904) 488-9896